

December 23, 2009

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the
Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551

Re: Docket No. R-1367 (Regulation Z, HELOCs)

Dear Ms. Johnson:

Our firms represent creditors and insurers that offer and administer debt cancellation contracts and debt suspension agreements (collectively “DCCs”). We appreciate the opportunity to comment on the proposed amendments to Regulation Z and the effect of those amendments on DCCs.

The amendments include two new requirements related to DCCs. One is a new disclosure form that must be provided to borrowers. The other is a new requirement for excluding DCC fees from the finance charge, which requires a creditor to determine a borrower’s eligibility for benefits upon enrollment. Both of these new requirements will have unintended consequences, which should be addressed before the rules are finalized.

In its current form, the proposed disclosure requirement discourages greater borrower understanding of DCCs and even conveys misinformation about the products. The new requirement for excluding DCC fees from the finance charge does not accommodate the variety of marketing scenarios used to offer DCCs to borrowers. These limitations, and other matters, are described further below, along with recommended changes.

New Disclosure Requirements

The proposed amendments and new disclosure requirements for DCC sales exceed requirements for other optional product sales and are inconsistent with the overall purpose of the Truth in Lending Act. These disclosures would require a creditor to provide a borrower with several additional disclosures concerning the voluntary nature, cost and eligibility restrictions associated with a DCC. The requirements would apply to open-end transactions, including HELOCs, if the product is voluntary and the borrower qualifies for benefits based on age or employment.

Current regulatory requirements already provide meaningful disclosures related to the product's voluntary nature, its costs, and eligibility restrictions.

Regulations issued by the Office of the Comptroller of the Currency (“OCC”) require a lender to provide meaningful disclosures related to the voluntary nature of the product, its costs, and eligibility requirements. Although the OCC’s disclosure requirements apply only to national bank offerings of DCCs, states rely on the OCC’s requirements for their state-chartered institutions, and the requirements are generally considered best practices in the industry. Any new disclosure requirements for DCC offerings set forth in Regulation Z should be consistent with the OCC’s disclosure requirements concerning voluntariness, product costs, and eligibility, and need not go beyond the current OCC requirements.

The OCC regulations generally require a creditor to provide two sets of disclosures: short-form and long-form. Both sets of disclosures advise a borrower that the product is optional and that whether or not the borrower purchases it will not affect the application for credit or the terms of any existing credit agreement with the creditor. The following language, or language similar to it, is required to be provided in both sets of disclosures:

- This product is optional
- Your purchase of [PRODUCT NAME] is optional. Whether or not you purchase [PRODUCT NAME] will not affect your application for credit or the terms of any existing credit agreement you have with the bank.

The short-form disclosures also include language that advises the borrower that additional information will be provided before the borrower is required to pay for the DCC. The short-form disclosures also must address eligibility requirements, conditions, and exclusions that could prevent the borrower from receiving benefits under the DCC, and must state that these requirements will be addressed in the additional written materials. The long-form disclosures contain the same language. The short-form disclosures must be made orally at the time the bank first solicits the purchase of a DCC. The long-form disclosures must be provided in writing before the borrower completes the purchase of the DCC.

The OCC’s regulations also require that before entering into a DCC, the bank must obtain a borrower’s written affirmative election to purchase a DCC and a written acknowledgment of receipt of the required disclosures.

The proposed disclosures are not meaningful

In their current form, the proposed additional disclosures are inconsistent with the stated purpose of the Truth in Lending Act: “to assure a *meaningful* disclosure of credit terms so that the borrower will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit...” (emphasis added). The proposed disclosures are not meaningful; they are not accurate and are potentially misleading. Moreover, the proposals would have the incongruent result of requiring disclosures for voluntary products that are actually greater than the disclosures applicable to mandatory products.

The proposed amendments require the borrower to be presented with a written disclosure designed to be read and signed by the borrower. (The form is provided in the appendices to the proposed rule.) The first part of the disclosure directs a borrower to “**STOP**.” This statement will discourage many borrowers from reading the disclosure in its entirety. They will read the word “**STOP**” and decide not to read any further. To be meaningful, a disclosure should be designed to encourage a borrower to read the entire disclosure. However, as proposed, this disclosure could cause a borrower to make a determination about the merits of a DCC without fully understanding the product.

Moreover, the inclusion of the word “**STOP**” conveys a negative message and will have a chilling effect on the sale of voluntary products authorized by other federal banking regulators and most states. A notice to a borrower that begins with the word “**STOP**” implies that DCCs have no value for any borrower and undermines the credibility and reputation of the creditor offering the product. Further, the sentence “you do not have to buy this product to get this loan” following the word “**STOP**” is not meaningful when the offer of the DCC occurs after the credit has already been extended. We strongly recommend that the word “**STOP**” be deleted from the disclosures. Alternatively, we suggest that the Board require a different phrase to call attention to the importance of the disclosures, such as “Important Information,” or “Please Read Fully.”

The phrase after “ **STOP**,” “You do **not** have to buy this product to get this loan,” needs to be modified so that it is consistent with the language required to be used in the short-form disclosures and the long-form disclosures for national bank offerings of DCCs, as set forth in the OCC’s regulation governing DCCs. Specifically, the sentence should be changed to read as follows: “Your purchase of [PRODUCT NAME] is optional. Whether or not you purchase [PRODUCT NAME] will not affect your application for credit or the terms of any existing credit agreement you have with the [lender.]”

The proposed disclosures are inaccurate and misleading

There are several issues with the next two proposed required written disclosures, “If you have *insurance* already, this product may not provide you with any additional benefits” and “Other types of *insurance* can give you similar benefits and are often less expensive.” (emphasis added)

First, both of the disclosures incorrectly suggest that a DCC is an insurance product. A DCC is not an insurance product. *See First Nat’l Bank of Eastern Arkansas v. Taylor*. It is a loan term, or a modification to existing loan terms. In addition to being inaccurate, the disclosures could cause a borrower to conclude that existing insurance products (such as life or homeowners insurance) will protect their credit account, when they may not.

Second, DCCs typically *do* cover many events and persons not covered by insurance policies. Moreover, DCCs will always provide an additional benefit to the borrower, because if a covered loss occurs, the borrower will receive the benefit independent of any other coverages the borrower may have. It is not instructive to ask a borrower to compare the benefits of such dissimilar products.

Third, fees for DCCs are often based on a borrower's outstanding credit balance or loan payment, allowing for the fee to be related *directly* to the borrower's credit usage. As with an attempt to compare the benefits of DCCs and insurance policies, comparing vastly different fee structures is not valid, and could cause the borrower to forego a potential benefit as well as damage the reputation of the creditor.

The third bulleted proposed required written disclosure, "Based on our review of your age and/or employment status at this time, you [may/would] be eligible to receive benefits," is unnecessary, as, regardless of the information obtained during the review, the "may" option is the only viable choice. Employment eligibility is not the only factor in a benefit determination. For example, in most DCCs, the borrower would be required to complete a form providing evidence of eligibility for the benefit. Informing a borrower that he "would" be eligible for a benefit is simply never possible, as a creditor has no way of knowing whether the borrower will otherwise comply with the terms of the DCC.

Recommendations

- (1) We strongly recommend that the word "**STOP**" be deleted from the disclosures.
- (2) The sentence following "**STOP**" should be replaced with the following statement, which is from the OCC's regulations:
 - This product is optional
 - Your purchase of [PRODUCT NAME] is optional. Whether or not you purchase [PRODUCT NAME] will not affect your application for credit or the terms of any existing credit agreement you have with the bank.
- (3) The sentences, "If you have insurance already, this product may not provide you with any additional benefits" and "Other types of insurance can give you similar benefits and are often less expensive" should be deleted. We recommend, instead, a statement suggesting the borrower review his insurance policies to ensure no duplication exists.
- (4) The sentence "Based on our review of your age and/or employment status at this time, you [may/would] be eligible to receive benefits" should be removed.

Other changes are needed

There are two other problems with the current form of the required written disclosures. First, they do not anticipate telephone sales. In those cases, a creditor should be permitted to mail the disclosures using the same rules that apply to telephone sales in 12 C.F.R. § 226.4(d)(4). Second, rather than referring a borrower to the Federal Reserve's website if he has a question about a DCC, a borrower should be referred to the lender's website. DCC contracts vary from creditor to creditor, and the best source for information about the details of a contract is the individual creditor.

We do not object to accurate and meaningful disclosures

As discussed above, we believe the current proposed required written disclosures have significant unintended negative consequences for borrowers. We wish to be clear, however, that we support accurate and meaningful disclosures. Indeed, as discussed above, national banks that offer DCCs are subject to extensive written and oral disclosure requirements regarding the terms and conditions of these products. Therefore, we would welcome the opportunity to assist Board staff in the design and content of additional disclosure requirements that accurately and meaningfully address DCCs and are consistent with requirements in existing law.

New Requirements for Excluding DCC Fees from the Finance Charge

The proposed amendments would expand the disclosure requirements necessary to exclude DCC fees from the finance charge on closed-end (not real estate-secured) credit and open-end credit. In addition to the current requirements imposed by 12 C.F.R. § 226.4(d)(3), a creditor also must determine that the borrower meets any applicable age and employment eligibility requirements at the time of enrollment and must provide a disclosure that such determination has been made. This determination must be made based on “reasonably reliable evidence.” In the case of employment eligibility, the proposal cites the following as acceptable evidence: a W-2, tax return, payroll receipt, or other evidence, such as a written communication from the borrower or the borrower’s employer.

The proposal also provides that if a creditor offers a “bundled product” (a DCC having multiple benefit triggers, such as a death feature and a disability feature), and the borrower does not meet the age and/or employment eligibility criteria, the creditor must either (1) treat the entire DCC fee as a finance charge, or (2) offer the borrower the option of selecting only the features for which the borrower is eligible, and exclude the DCC fee from the finance charge only if the borrower chooses an optional product that has been tailored so that the borrower meets the age and/or employment eligibility criteria at the time of enrollment.

The rule should not limit borrower choice

Borrowers should be free to choose a DCC, even if one or more of the benefits are based on age or employment status. An unemployed borrower, for example, may value the many benefits available that are not employment based, or may know that his employment situation is changing in the future, or may be relying on the eligibility of other employed individuals to qualify the account for benefits. It should be the borrower’s choice to make, not the creditor’s. Absent the changes recommended below, the proposal would likely preclude certain product offerings, as it would be overly burdensome and unmanageable to require creditors to support a system where some of a product’s fees are “in” and some “out” of the finance charge.

Moreover, credit applications often do not capture employment information sufficient to determine eligibility relevant to a DCC. Instead, application questions are geared toward whether the borrower has adequate sources of income. To the extent employment is addressed, the information may not fully explain the borrower’s employment situation as it relates to eligibility. For example, there is usually no inquiry into whether employment is temporary or seasonal. Nor does an application ask about the minimum hours worked per week or the months

on the job. To qualify for unemployment benefits, some DCCs require that there be a loss of a job having a 30-hour workweek, and the borrower must have been on the job for 3 consecutive months before the benefits can be activated. Additionally, there may be one or more other covered persons (individuals, such as a spouse or domestic partner, a higher wage earner in the household, or an authorized user on the credit card) who could qualify a borrower to receive benefits from an event even though the borrower may not qualify for certain benefits based on age or employment.

Further, the proposal does not take into consideration the significant number of DCC purchases that occur after the extension of credit, often connected to telephone and Internet marketing. In those situations, loan application information, to the extent it might contain age and employment information, is not readily available. Searching and reviewing application information would prevent borrowers from obtaining immediate access to DCC protection while the creditor conducted research. It would create a costly burden for the creditor, requiring additional systems adjustments, additional access to records, and an increase in employee base – all likely to increase the cost of the product. Further, especially in today’s economic environment, old application information often is not reliable and could detrimentally affect the borrower’s ability to obtain credit protection.

The requirements concerning bundled products would also limit borrower choice. To be truly voluntary, product selection must be a choice made by an individual after receiving sufficient information to make an educated decision, including information about eligibility for certain benefits. For the reasons stated above, borrowers should be free to choose a DCC, even if one or more of the benefits are based on age or employment status. If a creditor is forced to make a determination about eligibility for the borrower in connection with a bundled product, then it is the creditor’s choice, not the borrower’s, and the product truly could not be considered voluntary.

Recommendations

To address these issues, we recommend that:

- (1) Borrowers should be able to freely choose a DCC that contains age or employment limitations, without fees for the DCC being considered finance charges.
- (2) To the extent a DCC contains any benefit limitations based on age or employment status, the creditor should: (a) provide written disclosures alerting the borrower that age and/or employment related benefit limitations exist, along with a recommendation that the borrower carefully read all product terms provided by the creditor; (b) provide the borrower with a period of 30 days, similar to the “free look” period for insurance products, during which the borrower can review the product materials and determine whether the DCC meets his needs; and (c) refund any fees that have been paid if the DCC is cancelled within the 30-day period. These proposed requirements, including a 30-day “free look” period, are consistent with the special disclosure and affirmative election requirements in the OCC’s regulation governing DCCs that relate to telephone solicitations and solicitations using written mail inserts or “take one” applications.

Additional Recommendation

If the Board determines that employment eligibility must be determined prior to enrollment, we recommend that the best evidence of employment – the borrower’s verbal statement – be included in the list of “reasonably reliable evidence.”

Post-sale review is not needed

The proposed rule specifically asks for comment on whether a creditor should be required to determine eligibility after a product is sold, such as at the time of renewal, or should be required to give notice when the borrower exceeds the age limits. We see no reason for either requirement. Age is not usually a factor for DCCs. As a practical matter, creditors have no way to track employment status post-enrollment. Borrowers can move in and out of eligibility without the creditor knowing. For example, someone who is employed full time could be moved to part time hours a month after a DCC sale, and there is no way a creditor can track that and then adjust finance charge reporting of the DCC fees when a change in employment status occurs. Borrowers will receive adequate information about eligibility requirements from disclosure information already mandated by federal and state law, e.g., state insurance laws, debt cancellation product regulation and disclosure requirements (such as the DCC regulations issued by the Office of the Comptroller of the Currency, 12 C.F.R. Part 37).

Conclusion

We support the development of new disclosures as long as they are meaningful and not misleading, and are consistent with the disclosure requirements in the OCC’s regulations governing DCCs. We have included several recommendations in our comments. The proposed new requirements for excluding DCC fees from the finance charge would have unintended consequences, including limiting consumer choice. Those requirements should be deleted from the rule, as long as the creditor provides the borrower with certain protections, including a 30-day “free look” period to review the product and its eligibility requirements.

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